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WEBCOR CONSTRUCTION, INC. dba
WEBCOR BUILDERS

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA - SAN FRANCISCO DIVISION

UNITED STATES OF AMERICA for the use and
benefit of WEBCOR CONSTRUCTION, INC. dba
WEBCOR BUILDERS, and WEBCOR
CONSTRUCTION, INC. dba WEBCOR
BUILDERS,

Plaintiffs,

vs.

DICK/MORGANTI, a joint venture; DICK
CORPORATION; THE MORGANTI GROUP;
AMERICAN CASUALTY COMPANY OF
READING, PENNSYLVANIA; NATIONAL
UNION FIRE INSURANCE COMPANY OF
PITTSBURGH, PA; and DOES 1-10, inclusive,

Defendants.

AND RELATED THIRD-PARTY ACTIONS AND
CROSS-ACTIONS

CASE NO.: 3:07-CV-02564-CRB

**MEMORANDUM OF POINTS AND
AUTHORITIES IN SUPPORT OF
WEBCOR'S MOTION TO LIFT STAY OF
PROCEEDINGS**

Date: August 29, 2008
Time: 10:00 a.m.
Dept.: Courtroom 8
Judge: Hon. Charles R. Breyer

I. INTRODUCTION

Webcor Construction, Inc. dba Webcor Builders ("Webcor") hereby requests that this Court lift the conditional stay of proceedings entered on October 19, 2007 in light of the failure of Dick Morganti Joint Venture ("DM") to pursue with any reasonable diligence the resolution of Webcor's Change

1 Orders 60, 61 and 62 (collectively, for purposes of this motion, “the Webcor Claims”). Not only is DM
 2 obligated to diligently pursue such resolution under the terms of the parties’ subcontract agreement, DM
 3 has previously represented to the Court its desire to do so.

4 Unfortunately, as Webcor is all too familiar, DM has taken no affirmative action to pursue the
 5 Webcor Claims since the last status conference. Indeed, the stay has served the purposes of DM all too
 6 well, affording it the luxury of doing nothing while Webcor continues to finance the construction
 7 without any hope of equitable resolution and compensation within any defined period. Webcor
 8 respectfully requests that the stay be lifted so that it may pursue the timely resolution of its claims and
 9 entitlement to amounts due for base contract work and unreleased retention.

10 **II. STATEMENT OF FACTS**

11 These proceedings relate to the construction of the project commonly referred to as the GSA
 12 Federal Building Project located in San Francisco, California (“the Project”). The General Services
 13 Administration (“GSA”) is the owner of the Project and DM was the prime contractor on the Project.
 14 (*Declaration of Jack Harrington* (“*Harrington Decl.*”), at ¶ 1.) Defendants American Casualty
 15 Company and National Union Fire Insurance Company (hereinafter collectively, “the Sureties”) issued
 16 payment bonds for the Project pursuant to an agreement with DM. On or about May 5, 2003, Webcor
 17 entered into a written agreement with DM to provide concrete and formwork services for the Project
 18 (the “Subcontract”). (*Harrington Decl.*, at ¶ 3.) Under the Ninth Article of the Subcontract, titled
 19 “Claims,” DM explicitly agreed “to transmit to the Owner, other subcontractors, or other entity any
 20 such claims submitted to it by the Subcontractor.” (*Id.*) Under the Thirty-Eighth Article of the
 21 Subcontract, titled “Choice of Law and Disputes,” Webcor, under paragraph (d)(v), only agreed to stay
 22 any action filed by it as long as Webcor’s position was being diligently pursued by DM in the dispute
 23 with the GSA and Webcor’s claims were being carried forward through DM’s prosecution of the claims
 24 with the GSA. (*Harrington Decl.*, at ¶ 4.)

25 Throughout the course of the Project, Webcor put DM on notice regarding significant time and
 26 cost impacts resulting from, among other things, deficient project plans and specifications, changes in
 27 the scope of Webcor’s work and accessibility issues on the Project. (*Harrington Decl.*, at ¶ 5). In July
 28 2005, Webcor submitted its Change Order (“COR”) No. 60 to DM for equitable adjustment relating to

1 cost and schedule impacts experienced by Webcor in relation to rebar congestion and increased concrete
 2 finish requirements. (*Harrington Decl.*, at ¶ 6.) Webcor directed DM to immediately forward the claim
 3 to the GSA for decision. In October 2005, Webcor submitted COR Nos. 61 to 65 to DM for pass-
 4 through to the GSA for decision. DM refused to pass COR Nos. 61 to 65 through to the GSA.
 5 (*Harrington Decl.*, at ¶ 7.)¹

6 Thereafter, in October 2006, approximately fifteen (15) months after Webcor submitted COR
 7 No. 60, the GSA's Contracting Officer rejected Webcor's claim, but stated that DM could request a
 8 Contracting Officer's Decision. (*Declaration of Kenneth G. Jones* ("Jones Decl."), at ¶ 3.) Webcor
 9 immediately requested that DM seek a Contracting Officer's Decision as suggested by the GSA. DM
 10 rejected this request. (*Jones Decl.*, at ¶ 4.)

11 In May 2007, after pressing DM to submit COR No. 60 to the GSA for a Contracting Officer's
 12 Decision to no avail, Webcor was forced to pursue its rights through filing the instant action. (*Jones*
 13 *Decl.*, at ¶ 5.) Shortly thereafter, on June 13, 2007, DM agreed to pass COR No. 60 through to the GSA
 14 for a Contracting Officer's Decision. DM continued to refuse to pass through to the GSA Webcor's
 15 COR Nos. 61 through 65. (*Jones Decl.*, at ¶ 6.)

16 On October 19, 2007, this Court issued an Order staying all proceedings related to Webcor's
 17 claims, including COR Nos. 60 through 65, in order to determine if those claims related to the "global"
 18 claim DM anticipated filing and, at DM's request, to allow DM the opportunity to pursue claims with
 19 the GSA directly. (*Jones Decl.*, at ¶ 7.) On October 11, 2007, the GSA informed DM that it needed
 20 until April 11, 2008 to issue a Contracting Officer's Decision as to Webcor's COR No. 60. (*Jones*
 21 *Decl.*, at ¶ 8.) On December 19, 2007, after a further status conference, this Court lifted the stay of
 22 proceedings as to COR Nos. 63, 64 and 65 but reasserted the conditional stay as to COR Nos. 60, 61
 23 and 62 in light of DM's recently filed "global" claim and its representation to the Court that it would
 24 diligently and actively pursue claims, including Webcor's, with the GSA. (*Jones Decl.*, at ¶ 9.)

25 On January 25, 2008, counsel for Webcor met with counsel for DM in San Francisco to discuss
 26 the status of Webcor's claims and the Contracting Officer's request for additional time and documents

27 _____
 28 ¹ This Court previously lifted the stay of proceedings as to Webcor's COR Nos. 63, 64 and 65 and, as such, they are not the
 subject of this Motion.

1 in responding to Webcor's COR No. 60. (*Jones Decl.*, at ¶ 10.) DM's counsel agreed that if the
 2 Contracting Officer did anything other than accept Webcor's certified claims by the mid-April deadline
 3 promised by the GSA, that DM would immediately appeal the Contracting Officer's decision and seek
 4 an immediate appeal of Webcor's claims. (*Id.*) Counsel also agreed that the Contracting Officer's
 5 request for additional information from both DM and Webcor was not made in good faith and was an
 6 additional stall tactic. (*Id.*)

7 On February 8, 2008, DM certified and passed-through to the GSA COR Nos. 61 and 62.
 8 Pursuant to the terms of the Contracts Dispute Act, 41 U.S.C.S. § 605(c)(2), a decision, or a request for
 9 further time, was to be made within sixty (60) days thereof, which would have expired on or about
 10 April 14, 2008. To date, Webcor has received no communication from DM as to whether the GSA has
 11 rejected COR Nos. 61 and 62 or if it has requested further time to render a decision. (*Jones Decl.*, at ¶
 12 11.) Similarly, April 11, 2008 has come and gone and Webcor has received no communication from
 13 DM as to whether the GSA issued a Contracting Officer's Decision as to Webcor's COR No. 60.
 14 (*Jones Decl.*, at ¶ 12.)

15 III. LEGAL ARGUMENT

16 A. COURT SHOULD LIFT CONDITIONAL STAY IN ABSENCE OF TIMELY 17 DECISION BY GSA AND FAILURE OF DEFENDANTS TO DILIGENTLY PROSECUTE.

18 1. Court's Authority to Issue a Stay of Proceedings is Permissive.

19 The Court should lift its conditional stay of proceedings to allow Webcor to proceed against DM
 20 and the Sureties on its claims for COR Nos. 60, 61 and 62 as a result of the failure of DM and the
 21 Sureties to prosecute these claims with any reasonable diligence and the failure of the GSA to issue a
 22 timely decision. 41 U.S.C.S. § 605(c)(5) provides:

23 Any failure by the contracting officer to issue a decision on a contract claim within the
 24 period required will be deemed to be a decision by the contracting officer denying the
 25 claim and will authorize the commencement of the appeal or suit on the claim as
 26 otherwise provided in this Act. However, in the event an appeal or suit is so commenced
 in the absence of a prior decision by the contracting officer, **the tribunal concerned
 may, at its option, stay the proceedings** to obtain a decision on the claim by the
 contracting officer.

27 (Emphasis added.) Section 605(c)(5), which grants this Court the authority to issue such a stay,
 28 is thus permissive, not mandatory, such that this Court has the authority to allow Webcor to proceed.

2. **Contracting Officer's Failure to Issue Timely Decisions on COR Nos. 60 Through 62 Should be Deemed a Denial and Should Allow Claims to Proceed.**

The express purpose of a stay under 41 U.S.C.S. § 605(c)(5) is allow time for the Contracting Officer to issue a final decision. However, such a stay becomes futile and serves no purpose, other than to unreasonably delay the resolution of claims, where the Contracting Officer fails to timely issue any decision. In such a case, the stay becomes, in effect, a dilatory, if not punitive, measure.

The terms of 41 U.S.C.S. § 605 imply that the Congress foresaw the necessity of placing strictures on contracting officers in order to ensure that this very situation of a prolonged stay or lack of final decision did not occur. These strictures come in the form of timing restrictions and a reasonableness factor which require timely decisions and, when such requirements are not met, culminate in a "deemed denial" as provided for by Section 605(c)(5).

41 U.S.C.S. § 605(c)(2) provides the general timing requirement by providing that:

A contracting officer shall, **within sixty days of receipt of a submitted certified claim** over \$ 100,000--

(A) issue a decision; or

(B) notify the contractor of the time within which a decision will be issued.

(Emphasis added.) 41 U.S.C.S. § 605(c)(3) continues by providing a reasonableness factor which requires that:

The decision of a contracting officer on submitted claims shall be issued within a reasonable time, in accordance with regulations promulgated by the agency, taking into account such factors as the size and complexity of the claim and the adequacy of the information in support of the claim provided by the contractor.

(Emphasis added.)

It is undisputed that, as of the date of this writing, the Contracting Officer has failed to issue any decision on Webcor's COR Nos. 60, 61 or 62 and, further, that the Contracting Officer has failed to request additional time within which to issue a decision. Moreover, there can be no contention that the GSA and the Contracting Officer have not had "a reasonable time" to review said claims.

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a. Contracting Officer has had COR No. 60 for more than twenty-eight months.

The GSA and the Contracting Officer have possessed Webcor's COR No. 60 for a cumulative period of more than twenty-eight (28) months without rendering any decision. Webcor, through DM, initially passed its claim for COR No. 60 (in uncertified form) to the GSA for review in July 2005. (*Harrington Decl.*, at ¶ 6.) The GSA rejected COR No. 60 nearly fifteen (15) months later in October 2006. (*Jones Decl.*, at ¶ 3.)²

COR No. 60 was certified and resubmitted to the GSA and Contracting Officer, in substantially the same form, on June 13, 2007. In October 2007, after already possessing COR No. 60 for more than 120 days without issuing any decision, the Contracting Officer notified DM, without any explanation or basis, that it intended to issue a final decision on COR No. 60 by no later than April 11, 2008, nearly 11 months after submittal. (*Jones Decl.*, at ¶ 8.) April 2008 has come and gone and no decision has issued. The Contracting Officer has requested no additional time and has requested no additional information from Webcor to substantiate its claim.³

b. Contracting Officer has had COR Nos. 61 & 62 for more than five months.

On February 8, 2008, DM certified and passed-through to the GSA Webcor's COR Nos. 61 and 62. (*Jones Decl.*, at ¶ 11). Under the terms of 41 U.S.C.S. § 605, the Contracting Officer had sixty (60) days within which to issue a decision or request more time, which would have been around April 14, 2008. Again, more than five (5) months after submission, no decision has issued and, to the best of Webcor's knowledge, no request for additional time has ever been made.

Under any analysis, the GSA and the Contracting Officer have had more than sufficient and reasonable time to review the quantum of Webcor's COR Nos. 60, 61 and 62. DM and the Sureties will

² Webcor demanded that DM immediately request a Contracting Officer's final decision at this time, as the Contracting Officer advised, which DM refused to do. DM's failure to do so lead to an additional eight months of delay until COR No. 60 was ultimately certified and resubmitted to the GSA and the Contracting Officer. (*Jones Decl.*, at ¶¶ 4-5.)

³ Webcor acknowledges that the Contracting Officer did request in late 2007 several categories of documents relating to Webcor's COR Nos. 60, 61 and 62. However, what is telling about the request is that Webcor had already submitted such documents as a part of the initial claim submission back in 2005, and again in 2007, leading one to wonder if the Contracting Officer has even reviewed Webcor's claims.

likely contend that these are large, complex claims that are difficult to determine. However, the terms of 41 U.S.C.S. § 605(c)(3) do not exculpate the Contracting Officer from the requirements of Section 605(c)(2), which demands a decision within 60 days or a request for additional time, neither of which the Contracting Officer has complied with. Moreover, even overlooking Section 605(c)(2), which the Court lacks the authority to do, it is simply without dispute that the Contracting Officer has provided no indication that it considers Webcor's COR Nos. 60, 61 or 62 complex and, in addition, that the Contracting Officer has failed to request any further information or time it considers necessary to rendering a decision. The Contracting Officer, like DM and the Sureties, is simply delaying, and the present stay of proceedings has done nothing but encourage such conduct.

Additionally, DM has failed in its obligation to diligently pursue these claims and to appeal based on the failure of the Contracting Officer to render timely decisions. Indeed, DM's counsel acknowledged in a January 2008 meeting with Webcor that the GSA was stalling and agreed that if the GSA did anything other than accept Webcor's claims by the mid-April 2008, it would immediately appeal. (*Jones Decl.*, at ¶ 10.). True to form, DM has backslid again and failed to appeal Webcor's claims on the basis of a deemed decision as a result of the failure of the Contracting Officer to render a decision. Webcor respectfully requests that the stay be lifted.

B. DM'S FAILURE TO DILIGENTLY AND ACTIVELY PURSUE WEBCOR'S CLAIMS IS A CONTINUING MATERIAL BREACH OF THE SUBCONTRACT.

In conjunction with the utter failure of the Contracting Officer to comply with its burden under 41 U.S.C.S. § 605 in rendering decisions on COR Nos. 60, 61, and 62, DM's, and the Sureties', failure to exert any pressure on the Contracting Officer, or to utilize any reasonable diligence, in regards to Webcor's claims, is a clear example of DM's continuing material breach of the terms of the subcontract. Webcor's subcontract with DM expressly provides that Webcor's agreement to any stay of proceedings was conditioned upon DM's diligent pursuit of Webcor's claims against the GSA. DM has failed to pursue Webcor's claims with any diligence at all and continues to fail to even communicate with Webcor as to the status of proceedings.

Despite being contractually obligated to diligently pursue Webcor's claims with the GSA – and having expressly agreed to appeal Webcor's claims, DM and the Sureties have literally done nothing to

1 actively push the GSA for a decision. In fact, DM and the Sureties have been silent for nearly six (6)
 2 months and have provided Webcor no information as to the status of Webcor's claims. This is quite the
 3 opposite course of conduct from DM and the Sureties than what counsel for the Sureties represented to
 4 the Court in December 2007 when the Court was assured that DM and the Sureties would "push every
 5 button" with the GSA. DM and the Sureties have failed to do this, despite the clear failure of the
 6 Contracting Officer to execute its obligations. The resulting damage to Webcor is significant as
 7 Webcor has benefitted DM and the GSA through the value of its work without compensation and has
 8 been denied the ability to pursue the recovery of these amounts with interest.

9 **C. STAY SHOULD BE LIFTED AS TO AMOUNTS OF BASE CONTRACT AND**
 10 **RETENTION.**

11 The Court should also lift the stay with regard to Webcor's ability to litigate its entitlement to
 12 amounts due and owing to Webcor for base contract work, and amounts of retention for such work,
 13 performed under the subcontract. Such amounts are not "claims" for submission to the GSA for a
 14 Contracting Officer's decision; these are amounts for which DM is directly obligated to Webcor under
 15 the subcontract. Because these are pure contract issues, not pass-through claims which involve the
 16 GSA, they should not be subject to a stay of proceedings pending a "decision on the claim by the
 17 contracting officer" pursuant to 41 U.S.C.S 605(c)(5). Simply put, regardless of the outcome of the
 18 Contracting Officer's review of Webcor's COR Nos. 60, 61, and 62, DM is, and will remain,
 19 contractually liable to Webcor for amounts due and outstanding for base contract work and unreleased
 20 retention.

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1 **IV. CONCLUSION**

2 For all of the foregoing reasons, the stay implemented by this Court on October 19, 2007 should
3 be lifted and Webcor should be allowed to proceed against DM and the Sureties on its claims for COR
4 Nos. 60, 61 and 62 and any amounts due for base contract work and unreleased retention.

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6 Dated: July 24, 2008

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